IN THE
SUPREME COURT OF MISSOURI

State Of Missouri,	)	
	)	
Respondent,	)	
	)	
vs.	)	APPEAL NO. SC94646
	)	
Anwar Randle,	)	
	)	
Appellant.	)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY,
DIVISION ONE,
THE HONORABLE ROBERT S. COHEN,
JUDGE

APPELLANT'S SUBSTITUTE REPLY BRIEF

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INDEX

Page

TABLE OF AUTHORITIES

Page

***CASES*:**

***STATUTES*:**

JURISDICTIONAL STATEMENT

Appellant adopts and incorporates by reference the Jurisdictional Statement from his original brief.

STATEMENT OF FACTS

Appellant adopts and incorporates by reference the Statement of Facts from his original brief.

ARGUMENT

In its reply brief, the state correctly noted the following: "When there is a timely request for an instruction on an included offense (as there was in this case), the trial court is obligated to instruct the jury on that included offense 'if there is a basis in the evidence for acquitting the defendant of the immediately higher included offense and there is a basis in the evidence for convicting the defendant of' the requested included offense." Respondent's Substitute Brief at 9-10 (citing §556.046.3 RSMo and State v. Jackson, 433 S.W.3d 390, 396 (Mo. banc. 2014)). In addition, the state correctly identified that the immediately higher included offense at issue in Appellant's case is the offense of assault in the second degree and that as submitted in Appellant's case, the jury instruction on that offense required the jury to determine whether Appellant "knowingly caused physical injury to Cameron Bass by means of a dangerous instrument by shattering a glass bottle over his head." Respondent's brief at 10. The state then discussed this Court's opinion in State v. Jackson and conceded that there was a basis for acquitting Appellant of the offense of assault in the second degree. Respondent's Substitute Brief at 10-11. As such, Appellant requests this Court to find that the state has conceded all of the foregoing and to turn to the issue of whether there was a basis for convicting Appellant of the requested lesser included offense.

There was a basis for convicting Appellant of the requested lesser included offense. The state practically concedes this too. The state's reply brief talks about § 562.021 RSMo and concedes that under that statute, "proof that the defendant

acted knowingly (i.e., proof that the defendant had a higher culpable mental state) will nevertheless support a conviction for a reckless crime." Respondent's Substitute Brief at 13. The state's reply brief also concedes that: "[a]s stated in the comment to the 1973 Proposed Code, 'This [subsection] is useful in grading offenses (making it possible to convict for lesser included offenses) and also avoids the argument that something was not done recklessly because it was done knowingly or purposely.'" Respondent's Substitute Brief at 13. The state's reply brief further concedes the following:

> "It is certainly true that § 562.021.4 provides a basis to convict on a 'reckless' offense when the evidence proves a 'knowing' offense. And, to be sure, if the trial court instructs on an included offense and the defendant is found guilty of the included offense (as expressly permitted by § 556.046.1), then § 562.021.4, can be relied on to uphold the conviction if the evidence tends to show that the defendant actually had the higher culpable mental state."

As such, the state has conceded that under § 562.021 RSMo, there is a basis for convicting Appellant of the requested lesser included offense. That should end the inquiry in favor of Appellant.

Unfortunately, in its reply brief, the State pretends that this is not the end of the inquiry and proceeds to do exactly what it is not supposed to do and argues that something was not done recklessly because it was done knowingly or purposely. The state goes on to do this despite having acknowledged that: "[a]s stated in the

comment to the 1973 Proposed Code, '[§562.021.14] is useful in grading offenses (making it possible to convict for lesser included offenses) and also **avoids the argument that something was not done recklessly because it was done knowingly or purposely.**'" Respondent's Substitute Brief at 13.

In making its argument, the state asserts: "Consequently, the question in this case is whether the evidence supported an inference that, in smashing a bottle on Mr. Bass's head, Mr. Randle was merely "reckless," i.e., that he "consciously disregard[ed] a substantial and unjustifiable risk that" he would cause physical injury to the victim." Respondent's Substitute Brief at 16. Appellant takes issue with the state's assertion that Mr. Randle's conduct has to be "merely reckless" in order to provide a basis for conviction on the assault third instruction he requested. Why does it have to be "merely reckless?" Appellant asserts that conduct can meet the definition of knowingly and the definition of recklessly and that the two are not mutually exclusive. Appellant further asserts that his conduct meets the definition of recklessly. Pursuant to § 562.016.4, "A person 'acts recklessly' or is reckless when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." § 562.016.4 RSMo. And in smashing a bottle on Mr. Bass's head, Mr. Randle consciously disregarded a substantial and unjustifiable risk that he would cause physical injury to Mr. Bass, and such disregard constituted a gross deviation from the standard of care which a reasonable person

would have exercised in the situation. It does not matter that one might also find that he acted knowingly.

Moreover, in making its argument, the state relies heavily on State v. Lowe, 318 S.W.3d 812 (Mo. App. W.D. 2010). The State cites to State v. Lowe and asserts that for the notion that "[s]ome acts of violence, when viewed in relation to the charged result, transcend recklessness and do not give rise to an inference of recklessness. Respondent's Substitute Brief at 16. In State v. Lowe, the Missouri Court of Appeals for the Western District held as follows: "If 'no rational juror could reasonably conclude that the defendant did not act knowingly' based on the evidence presented, an instruction for the lesser included offense of manslaughter need not be given." State v. Lowe, 318 S.W.3d at 818. However, State v. Lowe predated this Court's ruling in State v. Jackson. And in State v. Jackson this Court said:

> "All decisions as to what evidence the jury must believe and what inferences the jury must draw are left to the jury, not to judges deciding what reasonable jurors must and must not do…The Court now reaffirms those holdings because, as long as the jury has the right to disbelieve all or any part of the evidence, and refuse to draw needed inferences, section 556.046 cannot be read any other way…" State v. Jackson, 433 S.W.3d at 399 (Mo. banc. 2014).

In addition, in State v. Jackson, this Court said:

> "The temptation to violate this principle and refuse to instruct down—though plainly wrong—can be almost overpowering in some cases, especially when the evidence is so strong and the inferences are so obvious that giving a lesser included offense instruction seems almost to beg for jury nullification or compromise verdicts. A sure sign that a judge or court is about to yield to this temptation is a reference to what a "reasonable juror" in a criminal case must or must not find. For example, in State v. Mease, 842 S.W.2d 98 (Mo. banc 1992), the Court surveyed the state's extensive evidence of deliberation and held that '[n]o rational fact finder could conclude that the defendant committed this homicide but that he did not deliberate on the killing.' Id. at 111.
>
> The temptation to deprive the jury of the right to disbelieve all or any part of the evidence, as this Court did in *Mease,* is neither new nor is it a weakness peculiar to this Court. Even luminaries of the judicial heavens have fallen prey to this temptation on occasion." State v. Jackson, 433 S.W.3d at 400.

Moreover, in State v. Jackson, this Court said:

> "When a court decides what instructions to give the jury in a criminal case under section 556.046 based on what a reasonable juror must and must not find, or what a reasonable juror must and must not infer, it tacks far too close to the forbidden waters of directing a verdict in a criminal case." State v. Jackson, 433 S.W.3d at 401.

As such, Appellant asserts that State v. Lowe has been abrogated by this Court's opinion in State v. Jackson and that the state's reliance on State v. Lowe is misplaced.

Ultimately, Mr. Randle was entitled to an instruction on his proposed assault third instruction if there was a basis to acquit him of the immediately higher lesser included offense, assault in the second degree, and a basis for convicting him of his proposed lesser on assault in the third degree. Both bases existed. The jury could have acquitted Mr. Randle of assault in the second degree if it found the following: 1) Mr. Bass did not sustain any serious physical injury as evidenced by state's exhibits fourteen and fifteen, 2) the bottle Mr. Randle hit Mr. Bass with was not used in a manner that made it readily capable of causing serious physical injury, and 3) Mr. Randle did not act by means of a dangerous instrument. In addition, the jury could have found Mr. Randle guilty based on his proposed assault third instruction because it believed that Mr. Randle nevertheless recklessly caused physical injury by smashing the bottle over Mr. Bass's head. There were also other bases of acquittal and conviction as discussed in Appellant's initial brief. The trial court clearly erred in refusing Appellant's refused jury instruction "A" on assault in the third degree.

CONCLUSION

For the reasons presented in this substitute reply brief and in appellant's original substitute brief, appellant respectfully requests that this Court reverse his convictions and remand for a new trial.

Respectfully submitted,

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Certificate of Compliance and Service

I, Srikant Chigurupati, hereby certify to the following. The attached reply brief complies with the limitations contained in Rule 84.06(b). The reply brief was completed using Microsoft Word in Times New Roman size 13 point font. Excluding the cover page, the signature block, and this certificate of compliance and service, the reply brief contains 1,912 words, which does not exceed twenty-five percent of the 31,000 words allowed for an appellant's brief.

On this 16th day of April, 2015, an electronic copy of Appellant's Substitute Reply Brief was placed for delivery through the Missouri e-Filing System to Shaun J. Mackelprang at shaun.mackelprang@ago.mo.gov.

/s/Srikant Chigurupati
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